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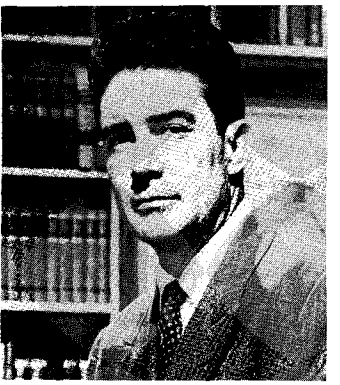

DAN SMOOT

EARL WARREN COURT—PART IV

"There is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore unalarming, instrumentality of the supreme court." — Thomas Jefferson[1]

Warren Should Be Impeached

A law of Congress prohibiting the Supreme Court from accepting jurisdiction in any of the types of cases which it has wrongly handled, and nullifying decisions already handed down in such cases; and a resolution of Congress, re-submitting the Fourteenth Amendment for rejection or ratification by the people—these two measures would eliminate most of the damage done by the Warren Court and would prevent similar damage in the future.

But that is not enough.

Simple legislative action will not undo the major disservice which Warren has done in destroying public respect for the Supreme Court. To re-establish the Court as a venerated part of our magnificent constitutional system, Congress should impeach Earl Warren.

The Constitution says federal judges shall hold their offices—not for life—but during good behavior. It also says, "judicial Officers . . . shall be bound by Oath or Affirmation to support this Constitution . . . ."

Concerning impeachment, the Constitution provides:

"The House of Representatives shall . . . have the sole Power of Impeachment . . . .

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present . . . .

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"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high crimes and Misdemeanors."

Treason is defined as "Levying War against them [the United States], or in adhering to their Enemies, giving them Aid and Comfort."

During impeachment proceedings against President Andrew Johnson (in 1868) this definition was developed:

"An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."[2]

Earl Warren could be impeached for high crimes, misdemeanors, failure to be bound by oath of office, and, possibly, treason.

Witnesses could include prominent persons quoted in this *Report* last week (and many others) who have condemned Warren for violating his oath to support the Constitution, and for aiding communists who are sworn enemies of the United States. The primary witnesses could be Warren's fellow Supreme Court justices—men whose dissents from decisions in which Warren participated are clearly accusations of *impeachable high crimes and misdemeanors,* as officially defined in 1868.

Testimony Against Warren

Below are samples of the kind of testimony against Earl Warren which can be gleaned from official opinions of Associate Supreme Court Justices. The 12 cases from which the samples are taken were decided during the period, 1956-1964, and were briefly reviewed in "Earl Warren Court—Part I," the March 22, 1965, issue of this *Report.*

THE CASE OF SUBVERSIVE FEDERAL EMPLOYEES. Associate Justices Tom Clark, Stanley Reed, and Sherman Minton dissented in the Warren Court's 1956 decision that the Summary Suspension Act of 1950 applied *only* to federal employees in sensitive positions. Justice Clark wrote the dissenting opinion, saying:

"The Court's order has stricken down the most effective weapon against subversive activity available to the government. It is not realistic to say that the Government can be protected merely by applying the Act to sensitive jobs. One never knows just which job is sensitive. The janitor might prove to be in as important a spot security-wise as the top employee in the building."

KONIGSBERG CASE. Dissenting in the Warren Court's Konigsberg Case decision of May 6, 1957, Associate Justice John Marshall Harlan said:

"It seems to me altogether beyond question that a state may refuse admission to its bar to an applicant, no matter how sincere, who refuses to answer questions which are reasonably relevant to his qualifications and which do not invade a constitutionally privileged area . . . .

"But what the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

SCHWARE CASE. Associate Justice Felix Frankfurter voted with the Warren Court majority in the Schware Case decision of May 6, 1957, but wrote a separate, concurring, opinion, saying:

"Admission to practice in a state and before its courts necessarily belongs to that State . . . .

"It is beyond this Court's function to act as overseer of a particular result of the procedure established by a particular State for admission to its bar . . . .

"Especially in this realm, it is not our business to substitute our judgment for the State's judgment — for it is the State in all the panoply of its powers that is under review when the action of its Supreme Court is under review."

JENCKS CASE. Dissenting in the Warren Court's Jencks Case decision of June 3, 1957, Associate Justice Tom Clark said:

"The Court . . . . fashions a new rule of evidence which is foreign to our federal juris-

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prudence . . . . The rule announced today has no support in any of our cases. Every federal judge and every lawyer of federal experience knows that . . . .

"Unless the congress changes the rule announced by the Court today, those intelligence agencies of our government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets . . . .

"It opens up a veritable Pandora's box of troubles. And all in the name of Justice."

WATKINS CASE. Dissenting in the Warren Court's Watkins Case decision of June 17, 1957, Associate Justice Tom Clark said:

"As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress.

"So long as the object of a legislative inquiry is legitimate . . . it is not for the courts to interfere with the committee system of inquiry. To hold otherwise would be an infringement on the power given the Congress to inform itself, and thus to trespass upon the fundamental American principle of separation of powers. The majority [of the Supreme Court] has substituted the judiciary as the grand inquisitor and supervisor of congressional investigations. It has never been so."

YATES CASE. In the Yates Case decision of June 17, 1957, the Warren Court, which is an *appellate* court, usurped the function of a jury in a *trial* court, thus violating a basic principle of American jurisprudence. Dissenting in this case, Associate Justice Tom Clark said:

"In its long history I find no [other] case in which an acquittal has been ordered by this Court solely on the *facts*. It is somewhat late to start in now usurping the function of the jury, especially where new trials are to be held covering the same charges."

NEW YORK SCHOOL PRAYER CASE. Dissenting in the Warren Court's New York School Prayer Case decision of June 25, 1962, Associate Justice Potter Stewart said:

". . . the court says that in permitting school children to say . . . [a] simple prayer, the New York authorities have established 'an official religion.'

"With all respect, I think the court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation . . . ."

APPORTIONMENT CASES. In 1905, Associate Justice John Marshall Harlan (grandfather of the present Supreme Court justice with the same name) dissented in a Supreme Court decision which overturned a New York State law regulating working hours in bakeries, saying:

"No evils arising from . . . [State] legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives . . . ."

On June 15, 1964, the present Associate Justice Harlan (echoing the prophetic sentiments of his grandfather) dissented in the Warren Court's apportionment decisions, saying:

"These decisions . . . have the effect of placing basic aspects of State political systems under the pervasive overlordship of the Federal judiciary. Once again, I must register my protest.

"Today's holding is that the equal-protection clause of the 14th amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people . . . .

"The equal-protection clause was never intended to inhibit the States in . . . apportionment of their legislatures. This is shown by the language of the 14th amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the amendment was adopted . . . .

"The failure of the Court to consider any of these matters cannot be excused or explained by

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any concept of 'developing' constitutionalism. It is meaningless to speak of constitutional 'development' when both the language and the history of the controlling provisions of the Constitution are wholly ignored . . . .

"State legislative apportionments, as such, are wholly free of constitutional limitations . . . . The Court's action now bringing them within the purview of the 14th amendment amounts to nothing less than an exercise of the amending power by this Court . . . .

"So far as the Federal Constitution is concerned, the complaints in these cases should all have been dismissed . . . because what has been alleged or proved shows no violation of any constitutional right . . . .

"The history of the adoption of the 14th amendment provides conclusive evidence that neither those who proposed nor those who ratified the amendment believed that the equal-protection clause limited the power of the States to apportion their legislatures as they saw fit. Moreover, the history demonstrates that the intention to leave this power undisturbed was deliberate . . . .

"The Court's elaboration of its new 'constitutional' doctrine indicates how far — and how unwisely — it has strayed from the appropriate bounds of its authority . . . . It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States . . . .

"Records such as these in the cases decided today . . . . present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference . . . .

"What is done today [by the Supreme Court] deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible . . . . The vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time, a complacent body politic may result.

"These decisions also cut deeply into the fabric of our federalism . . . . The aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal judiciary. Only one who has an overbearing impatience with the Federal system and its political processes will believe that that cost was not too high or was inevitable . . . .

"The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens.

"This court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the court adds something to the Constitution that was deliberately excluded from it, the court in reality substitutes its view of what should be so far the amending process."

Associate Justice Potter Stewart, dissenting in the June 15, 1964, apportionment decisions, said:

"The Court's draconian [which means, according to Webster's Unabridged Dictionary, *barbarously severe; harsh; cruel*] pronouncement, which makes unconstitutional the legislatures of most of the 50 States, finds no support in the words of the Constitution, in any prior decision of this Court, or in the 175-year political history of our Federal Union . . . ."

CONGRESSIONAL DISTRICTING CASE. Dissenting in *Wesberry versus Sanders*, the Warren Court's congressional districting case decision, February 17, 1964, Associate Justice Harlan said:

"I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today's decision . . . .

"It is unsound logically on its face and demonstrably unsound historically . . . .

"It goes without saying that it is beyond the province of this Court to decide whether equally

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populated districts is the preferable method for electing Representatives, whether state legislatures would have acted more fairly or wisely had they adopted such a method, or whether Congress has been derelict in not requiring state legislatures to follow that course. Once it is clear that there is no *constitutional* right at stake, that ends the case . . . .

"The Court's holding is, of course, derogatory not only of the power of the state legislatures but also of the power of Congress, both theoretically and as they have actually exercised their power . . . . It freezes upon both, for no reason other than that it seems wise to the majority of the present Court, a particular political theory for the selection of Representatives . . . .

"The . . . language of Article I, Sections 2 and 4 [of the Constitution], the surrounding text, and the relevant history are all in strong and consistent direct contradiction of the Court's holding . . . .

"It cannot be contended, therefore, that the Court's decision today fills a gap left by Congress. On the contrary, the Court substitutes its own judgment for that of the Congress . . . .

"The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process . . . .

"The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short . . . .

"What is done today saps the political process . . . . By yielding to the demand for a judicial remedy, in this instance, the Court in my view does disservice both to itself and to the broader values of our system of government . . . ."

Associate Justice Potter Stewart's dissent in *Wesberry versus Sanders*, says:

". . . the Constitution gives no mandate to this Court or to any court to ordain that congressional districts within each State must be equal in population."

SIT-IN CASES. Associate Justices Harlan, Black, and White dissented in the Warren Court's June 22, 1964, decision which overturned the convictions of sit-in demonstrators who had been tried under local and state laws prohibiting trespass on private property. The Court gave no grounds for its decision. The dissenting justices said:

"We think that the question should be decided and that the Fourteenth Amendment does not forbid this application of a state's trespass laws . . . to prosecute for crimes committed against a person or his property, however narrow the victim's views may be . . . . Such a doctrine would not only be based on a fiction, it would also severely handicap a state's efforts to maintain a peaceful and orderly society.

"Our society has put its trust in a system of criminal laws to punish lawless conduct . . . it would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace.

"[The 14th Amendment] . . . does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him otherwise."

MONROE CASE. Dissenting in the Warren Court's February 20, 1961, Monroe Case decision, Associate Justice Felix Frankfurter said the effect of the decision was to convert the U. S. Constitution into a,

"law to regulate the quotidian [daily] business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country."

NOIA CASE. Dissenting in *Fay versus Noia* (March 18, 1963), Associate Justice Tom Clark said:

"Beyond question the federal courts until today have had no power to release a prisoner in respondent Noia's predicament, there being no basis for such power in either the Constitution or the statute. But the Court today in releasing

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Noia makes an abrupt break not only with the Constitution and the statute but also with its past decisions, disrupting the delicate balance of federalism so foremost in the minds of the Founding Fathers and so uniquely important in the field of law enforcement. The short of it is that Noia's incarceration rests entirely on an adequate and independent state ground—namely, that he knowingly failed to perfect any appeal from his conviction of murder . . . .

"The Court . . . effectively swings closed the doors of justice in the face of the State, since it certainly cannot prove its case 20 years after the fact . . . .

"There can be no question but that a rash of new applications from State prisoners will pour into the Federal courts, and 98 percent of them will be frivolous . . . . This influx will necessarily have an adverse effect upon the disposition of meritorious applications, for . . . they will be buried in a flood of worthless ones . . . .

"Second, the effective administration of criminal justice in State courts receives a staggering blow. *Habeas Corpus* is in effect substituted for appeal, seriously disturbing the orderly disposition of State prosecutions and jeopardizing the finality of State convictions in disregard of the States' comprehensive procedural safeguards which, until today, have been respected by the Federal courts. Essential to the administration of justice is the prompt enforcement of judicial decrees. After today, State judgments will be relegated to a judicial limbo, subject to Federal collateral attack . . . .

"The rights of the States to develop and enforce their own judicial procedures . . . . are today attenuated if not obliterated in the name of a victory for the 'struggle for personal liberty.' But the Constitution comprehends another struggle of equal importance and places upon our shoulders the burden of maintaining it — the struggle for law and order.

"I regret that the Court does not often recognize that each defeat in that struggle [for law and order] chips away inexorably at the base of that very personal liberty which it seeks to protect . . . ."

Dissenting in *Fay versus Noia*, Associate Justice Harlan said:

"This decision, both in its abrupt break with the past and in its consequences for the future, is one of the most disquieting that the Court has rendered in a long time . . . .

"The federal courts have no power, statutory or constitutional, to release the respondent Noia from state detention . . . . In what it does today, the Court has turned its back on history and struck a heavy blow at the foundations of our federal system . . . ."

Rationale of Impeachment

As pointed out in "Earl Warren Court—Part III," proposals that U. S. Supreme Court justices be impeached were made in February and June, 1957. In the July 1, 1957, issue of this *Report*, I reviewed enough dissenting opinions in Warren Court decisions to show that the justices could logically be impeached on the basis of what they were saying about each other.

Early in 1961, the John Birch Society launched a project in public education, to create an educated concern and insistent demand that would persuade the House of Representatives to bring impeachment charges against Chief Justice Earl Warren.

Whereas earlier suggestions about the impeachment of several Warren Court justices had created relatively little interest, the John Birch Society's singling out Earl Warren evoked howls of rage from communists and liberals throughout the land. The impeach-Earl Warren project started an incredible avalanche of false and distorted propaganda intended to discredit the John Birch Society as a "hate group" and all its members as fools, crackpots, or subversives more dangerous than communists.

The John Birch Society still demands impeachment of Earl Warren, and leftwing hatred of the Society still grows.

A trenchant commentary on this situation was made by Federal Judge T. Whitfield Davidson of Dallas, a profound constitutional scholar who has been on the federal bench for more than 30 years—probably the ablest man to grace the federal judiciary in this century. In a letter published

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by *The Dallas Morning News*, December 3, 1964, Federal Judge Davidson said:

". . . I am not a member [of the John Birch Society] and am not personally acquainted with any man or woman who is a member, according to my knowledge; but during the recent campaign I had heard it criticized as a group of extremists; and I have asked several people who made the criticism to tell me what was the extreme; and none of them could tell me . . . .

"I have never heard of the John Birch Society's advocating anything in particular which I would consider extreme. The worst thing they have been charged with was an effort to impeach Justice Warren. Well, Thomas Jefferson wanted to impeach Judge Chase of the same court. He was impeached and tried, though acquitted.

"Andrew Johnson was impeached and acquitted, but the people who urged the impeachment in each case have never been outlawed nor has any well-organized group demanded that they be outlawed.

"And our senior member of Congress, the Hon. Wright Patman, introduced into Congress an act to impeach Andrew Mellon when he was secretary of the Treasury. We have never jumped on Wright or denounced him as an extremist."

What You Can Do

The Earl Warren Court has virtually scrapped the Constitution of the United States, leaving us at the mercy of a little oligarchy of men who have usurped power to revolutionize our society and remake our organic law, in compliance with their personal ideologies, whims, and moods.

The demand that something be done about the Court is great, but most proposals formally being made at present are wrong. As I pointed out last week, any constitutional amendment to offset the harmful effects of an unconstitutional Warren Court decision would do more harm than good.

To solve the problem, Congress should do three things:

(1) Pass a law saying the federal courts never did have, do not now have, and never shall have appellate jurisdiction in any case affecting religious or educational matters; in any case affecting procedures of state courts or laws enacted by state legislatures; in any case affecting state and local legislative or executive actions involving efforts to control subversive activities; in any case affecting investigative activities of the national Congress—and declaring null and void all federal court decisions already handed down in these fields;

(2) Enact a resolution re-submitting the Fourteenth Amendment to all states for proper ratification or rejection;

(3) Impeach Chief Justice Earl Warren.

Congress will do none of these things until public demand is overwhelming. Public demand will never be great enough, until the public is informed and aroused to action.

The job of those who know what should be done is to educate others. You who agree with my proposals can do a valuable public service by widely distributing reprints of this four-part series of *Reports* on the Earl Warren Court. Any *Report* in the series can be ordered in bulk at our regular reprint prices (quoted at the bottom of the first page of each *Report*). All four *Reports* can be ordered as a set, at the following special prices:

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FOOTNOTES

For specific information on Supreme Court decisions mentioned herein, see this *Report*, "Earl Warren Court—Part I."

(1) *The Constitutional Principles of Thomas Jefferson*, by Caleb Perry Patterson, University of Texas Press, Austin, Texas, 1953, p. 71

(2) *The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases Decided By The Supreme Court Of The United States To June* 30, 1952, prepared by the Legislative Reference Service of the Library of Congress and edited by Edward S. Corwin, published as Senate Document 170, May 30, 1953, pp. 503

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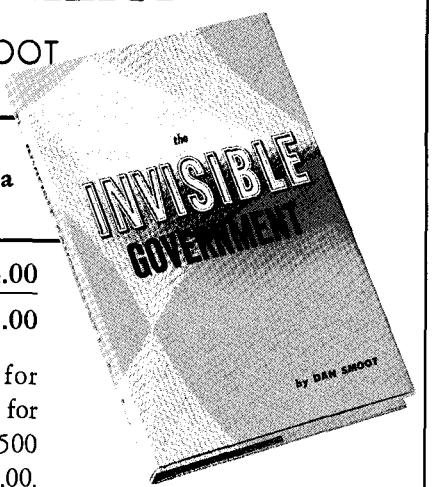

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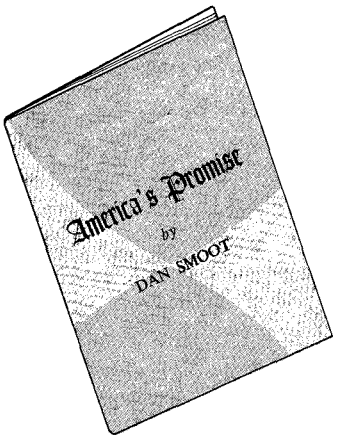

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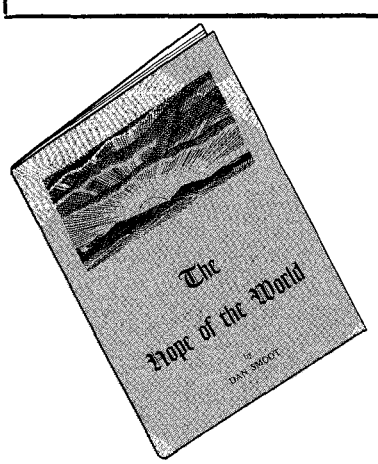

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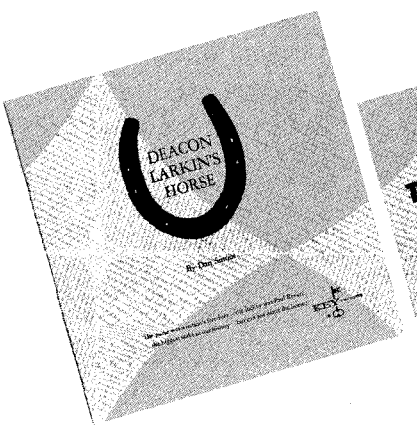

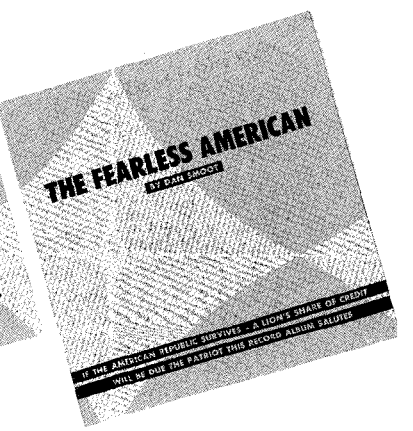

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